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Mengawarti Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–83 OF 1997
MOHD GHAZALI, LOW HOP BING AND VINCENT NG JJCA
10 APRIL 2009

Revenue Law — Income tax — Capital versus income — Land-alienation costs — Whether incurred by housing developer company capital expenditure or revenue expenditure

Revenue Law — Income tax — Deduction — Whether land-alienation costs deductible from housing developer company's income — Whether land-alienation costs wholly and exclusively incurred in production of housing developer's income — Whether allowable deduction — Income Tax Act 1967 s 33(1)

The main objective of the taxpayer company was as a housing developer. The taxpayer had applied for and obtained alienation of 250 acres of leasehold land from the state government for the purpose of housing development. The taxpayer had to pay the premium and other statutory charges, amounting to RM858,050 ('the land-alienation costs'). In 1980, the taxpayer entered into an agreement with another housing developer, Masa Merdeka Sdn Bhd ('Masa Merdeka') to develop the land, at a price to be paid by Masa Merdeka to the taxpayer. The only issue before the High Court was whether the land-alienation costs were deductible from the taxpayer's income. The High Court held that the land-alienation costs were capital expenditures for the acquisition of the land; and that they were not wholly and exclusively incurred in the production of the income, nor incurred in the period when the taxpayer received the income. The taxpayer appealed against the decision of the High Court.

Held, dismissing the appeal with costs:

(1) The Special Commissioners had found no evidence at all of the existence of the payment of the land-alienation costs by the taxpayer to the state government. The Special Commissioners' finding that there was no evidence of the date and actual amount paid to the state government was unassailable; neither could it be overruled nor supplemented by the High Court. The Special Commissioners' finding,

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as triers or finders of facts, was to be preferred (see paras 22–23 & 25). *Chua Lip Kong v Director General of Inland Revenue* [1982] 1 MLJ 235 referred.

(2) Even by accepting the finding of the High Court that there was evidence that the taxpayer had in 1980 paid the land-alienation costs to the state government, the learned judge was correct on the law as the land-alienation costs were capital expenditures for acquiring the land, and not revenue expenditures. These expenditures were not wholly and exclusively incurred in the production of the taxpayer's gross income of RM900,000, nor were they incurred in the period when the taxpayer received the income in 1981 and 1983. The requirement that all outgoings and expenses must have been wholly and exclusively incurred during the said period is expressly contained in s 33(1) of the Income Tax Act 1967. The land-alienation costs were therefore not allowable as deductions from the income (see paras 26 & 28).

[Bahasa Malaysia summary

Objektif utama syarikat pembayar cukai adalah sebagai pemaju perumahan. Pembayar cukai telah memohon dan mendapatkan pemberian milik 250 ekar tanah pegangan pajak daripada kerajaan negeri bagi tujuan pembangunan perumahan. Pembayar cukai perlu membayar premium dan bayaran statutori yang lain, berjumlah RM858,050 ('kos pemberian milik tanah'). Pada 1980, pembayar cukai menandatangani satu perjanjian dengan pemaju perumahan yang lain, Masa Merdeka Sdn Bhd ('Masa Merdeka') untuk membangunkan tanah tersebut, pada harga yang perlu dibayar oleh Masa Merdeka kepada pembayar cukai. Isu yang ditimbulkan di Mahkamah Tinggi ialah sama ada kos pemberian milik tanah boleh ditolak daripada pendapatan pembayar cukai. Mahkamah Tinggi memutuskan bahawa kos pemberian milik tanah adalah perbelanjaan kapital untuk memiliki tanah dan bahawa perbelanjaan tersebut bukan secara keseluruhan dan eksklusif ditanggung dalam pengeluaran pendapatan, atau ditanggung dalam tempoh apabila pembayar cukai menerima pendapatannya. Pembayar cukai tersebut merayu terhadap keputusan Mahkamah Tinggi.

Diputuskan, menolak rayuan dengan kos:

(1) Pesuruhjaya Khas tidak menemui sebarang keterangan mengenai kewujudan bayaran kos pemberian milik tanah oleh pembayar cukai kepada kerajaan negeri. Kesimpulan Pesuruhjaya Khas bahawa tiada keterangan tarikh dan jumlah sebenar yang dibayar kepada kerajaan negeri tidak dapat disangkal; ia juga tidak boleh ditolak atau ditambah oleh Mahkamah Tinggi. Keputusan Pesuruhjaya Khas, sebagai pemutus

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atau penentu fakta-fakta, diterima (lihat perenggan 22–23 & 25). *Chua Lip Kong v Director General of Inland Revenue* [1982] 1 MLJ 235 dirujuk.

(2) Walaupun dengan menerima kesimpulan Mahkamah Tinggi bahawa terdapat keterangan yang pembayar cukai tersebut pernah membayar kos pemberian milik tanah kepada kerajaan negeri pada 1980, hakim yang bijaksana adalah benar atas undang-undang memandangkan kos pemberian milik tanah merupakan perbelanjaan kapital untuk mendapatkan tanah, dan bukannya perbelanjaan hasil. Perbelanjaan-perbelanjaan tersebut bukan secara keseluruhannya atau eksklusif ditanggung dalam pengeluaran pendapatan kasar pembayar cukai sebanyak RM900,000 atau ditanggung dalam tempoh pembayar cukai menerima pendapatannya pada tahun 1981 dan 1983. Keperluan bahawa kesemua perbelanjaan keluar ditanggung secara keseluruhan atau eksklusif sepanjang tempoh tersebut dinyatakan secara jelas dalam s 33(1) Akta Cukai Pendapatan 1967. Oleh itu kos pemberian milik tanah tersebut tidak dibenarkan sebagai penolakan daripada pendapatan (lihat perenggan 26 & 28).]

Notes

For cases on capital versus income, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2228–2230.

For cases on deduction, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2275–2316.

Cases referred to

Chua Lip Kong v Director General of Inland Revenue [1982] 1 MLJ 235, PC (refd)

Edwards (Inspector of Taxes) v Bairstow & Anor [1956] AC 14, HL (refd)

UHG v Director General of Inland Revenue [1974] 2 MLJ 33, FC (refd)

Legislation referred to

Income Tax Act 1967 s 33(1)

Appeal from: Civil Appeal No R1–14–11 of 1995 (High Court, Kuala Lumpur)

WSW Davidson (Francis Tan and HL Wong with him) (Azman Davidson & Co) for the appellant.

Neng Juliana Ismail (Noor Kamaliah and Mohamad Japeri with her) (Legal Officers, Legal Department, Inland Revenue Board) for the respondent.

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Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] On 10 June 1997, the Kuala Lumpur High Court affirmed the deciding order of the Special Commissioners of Income Tax ('the Special Commissioners') in dismissing the claims by the appellant ('the taxpayer') for deduction of two amounts viz RM767,918 and RM63,442 from the taxpayer's gross income for two years of assessment viz 1982 and 1984 respectively.

[2] This is the taxpayer's appeal against the decision of the High Court.

FACTUAL BACKGROUND

[3] The taxpayer's memorandum and articles of association state that the main objective of the taxpayer, incorporated on 20 January 1979, is that of a housing developer.

[4] The taxpayer had applied to the State Government of Melaka ('the State Government') for alienation of 250 acres of leasehold land for the purpose of housing development. The state government approved the application vide notification dated 1 February 1980. The taxpayer had to pay the premium and other statutory charges, amounting to RM831,340 (collectively 'the land-alienation costs') within two months from the date of receiving the notification.

[5] On 5 March 1980, the taxpayer entered into an agreement with another housing developer, Masa Merdeka Sdn Bhd ('Masa Merdeka') to develop the land, at a consideration of RM3.5m to be paid by Masa Merdeka to the taxpayer, as follows:

(1) RM850,000, before 1 April 1980 ie the expiry date of the notification dated 1 February 1980; and

(2) the balance sum of RM2,650,000, to be paid proportionately by reference to the area of the land developed.

[6] The notification was subsequently replaced by another notification, dated 16 May 1980, which required the taxpayer to pay an increased amount of RM858,050 for the alienation of the land.

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[7] A qualified title was issued by the state government on 18 September 1980.

[8] On 31 December 1980, the taxpayer and Masa Merdeka entered into another agreement which varied the consideration from RM3.5m to RM900,000 ('the 31 December 1980 agreement') payable as follows:

(1) RM831,340 within two weeks from the date of the letter of approval from the land administrator of Melaka Tengah; and

(2) balance sum RM68,660, to be paid upon completion of the housing estate.

[9] The taxpayer's balance sheet carried, inter alia, the following entries:

	Period	Item	Amount
1	For the year ended 31 December 1980	(a) Land for Development (b) Advanced (unsecured)	RM831,340 RM864,503
2	For the year ended 31 December 1981	(a) Land for development (b) Advance (unsecured)	RM831,340 RM864,600
3	For the year ended 31 December 1982	(a) Land for Development (b) Advance (unsecured)	Increased to RM858,050 from RM831,340 Increased to RM900,000 from RM864,600 and reclassified as Deferred Income

[10] On 8 July 1983, a supplemental agreement was entered into between the taxpayer and Masa Merdeka, providing for the payment by Masa Merdeka to the taxpayer of an additional consideration of 50 sen per sq ft when the buildings are completed and sold by Masa Merdeka.

[11] The taxpayer was assessed to tax as follows:

Year of Assessment	Tax
1982	RM831,340
1984	RM68,600

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[12] Being dissatisfied, the taxpayer lodged an appeal with the Special Commissioners. A

ISSUES BEFORE THE SPECIAL COMMISSIONERS

[13] Two issues raised for determination by the Special Commissioners were: B

(1) Was the sum of RM900,000 received by the taxpayer as 'advance' or 'income'? and

(2) If the sum of RM900,000 were received as 'income', should the land-alienation costs be allowed as deductible expenses? C

[14] In essence, the Special Commissioners' findings of facts and deciding order are to the following effect: D

(1) the sum of RM900,000 was not 'advance' but 'income' ie profit from the sale of development rights and hence assessable to tax under the Income Tax Act 1967; and

(2) the land-alienation costs should not be allowed as deductible expenses against the income of RM900,000 as there was no evidence of the date and the actual amount paid to the state government. E

ISSUE BEFORE THE HIGH COURT F

[15] Before the High Court, the taxpayer abandoned the contention that the sum of RM900,000 represented 'advance' and conceded that it was 'income', but continued to assert that the land-alienation costs were deductible against the income of RM900,000 ('income'). Hence, the only issue before the High Court was whether the land-alienation costs were deductible from the income. G

[16] The High Court rejected the taxpayer's assertion and held that the land-alienation costs: H

(1) were capital expenditures for the acquisition of the land; and

(2) were not wholly and exclusively incurred in the production of the income, nor incurred in the period when the taxpayer received the income. I

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ISSUE BEFORE THIS COURT

[17] The sole issue raised for determination by this court is whether the land-alienation costs were allowable as deductions from the income.

FINDING OF FACTS

[18] Ms Neng Juliana Ismail (assisted by Ms Noor Kamaliah and Mr Mohamad Japeri) submitted for the Director General of Inland Revenue ('the Revenue') that the findings of primary facts by the Special Commissioners are unassailable and can neither be overruled nor supplemented by the High Court. For this proposition, the Revenue cited *Chua Lip Kong v Director General of Inland Revenue* [1982] 1 MLJ 235 at p 236 (PC).

[19] Taxpayer's learned counsel Dato' WSW Davidson (Mr Francis Tan and Mr HL Wong with him) contended that the Revenue's submission is incorrect as *Chua Lip Kong*, makes a distinction between the findings of primary facts and inferences drawn from primary facts, and relied on *Edwards (Inspector of Taxes) v Bairstow and Another* [1956] AC 14 at p 29 (HL).

[20] I would first extract the essential principles expounded in the speech of Viscount Simonds in the House of Lords in *Edwards v Bairstow*, as follows:

(1) a pure finding of fact may be set aside if it appears that the Commissioners have acted without any evidence, or upon a view of the facts which could not reasonably be ascertained;

(2) the primary facts may not reasonably be supported if:

(a) they do not justify the inference or conclusion which the Commissioners have drawn; or they lead irresistibly to the opposite inference or conclusion; or

(b) the finding is perverse.

Edwards v Bairstow, was followed in *Chua Lip Kong*, by Lord Diplock in delivering the advice of the Privy Council. His Lordship set out the following relevant established principles:

(1) in every case stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded;

(2) findings of primary facts by the Special Commissioners are unassailable, and cannot be overruled or supplemented by the High Court;

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(3) occasionally, the primary facts may be insufficient to enable the High Court to decide the question of law sought to be raised by the case stated; in that event, it will be necessary for the case to be remitted to the Commissioners for further findings;

(4) it is the primary facts so found by the Commissioners that they should set out in the case stated as having been 'admitted or proved';

(5) from the primary facts admitted or proved, the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners' findings of primary facts; but they may be, or may involve (and very often do) assumptions as to the legal effect or consequences of primary facts, and there are always questions of law upon which it is the function of the High Court on consideration of a case stated to correct the Special Commissioners if they can be shewn to have proceeded upon some erroneous assumptions as to the relevant law; and

(6) in a case stated, the Special Commissioners should set out, in a separate paragraph from that which contains their findings of primary facts, such inferences as they have drawn from those primary facts in the process of arriving at their decision, so that the court may be able to identify the true nature of the inferences viz whether they are pure inferences of fact or whether they involve assumptions as to the legal effect or consequences of fact; and, in the latter event, what those assumptions were.

(See also *UHG v Director General of Inland Revenue* [1974] 2 MLJ 33 at p 34G).

[21] Reverting to the mainstream of the instant appeal, it needs to be noted that the Special Commissioners had found no evidence at all of the existence of the payment of the land-alienation costs by the taxpayer to the state government. This crucial finding is to be found at p 45 of the appeal record and merits reproduction as follows:

> In fact, no evidence was adduced to indicate exactly how much and when the land alienation costs had actually been paid by the taxpayer to the state government.

[22] In applying the above established principles set out in *Chua Lip Kong*, I am of the view that the Special Commissioners' finding (that there is no evidence of the date and actual amount paid to the state government) is unassailable; neither can it be overruled nor supplemented by the High Court.

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[23] Notwithstanding that, the High Court found as follows:

> But according to the evidence, only the sum of RM831,340 was paid by the appellant to the state government. This must be in pursuance to the amount stated in the notification of 1 February 1990 mentioned earlier. This amount must have been paid in 1980 for the document of title was issued on 18 September 1980.

(See p 23 of the appeal record).

[24] The finding of the High Court is in direct contradiction to the Special Commissioners' finding. The High Court has assailed, overruled or supplemented the Special Commissioners' finding of primary facts, contrary to the well-known principles set out by Lord Diplock in *Chua Lip Kong*. In this regard, the High Court has erred. The Special Commissioners' finding, as triers or finders of facts, is to be preferred. The Special Commissioners' deciding order, being free from any error, should be affirmed.

[25] For completeness, even by accepting the finding of the High Court that there was evidence that the taxpayer had in 1980 paid the land-alienation costs to the state government, the learned judge was correct on the law as the land-alienation costs were capital expenditures for acquiring the land, and not revenue expenditures. In any event, these expenditures were not wholly and exclusively incurred in the production of the taxpayer's gross income of RM900,000, nor were they incurred in the period when the taxpayer received the income in 1981 and 1983. Clearly, such requirement that all outgoings and expenses must have been wholly and exclusively incurred during the said period is expressly contained in s 33(1) of the Income Tax Act 1967 which reads as follows:

> 33(1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses *wholly and exclusively incurred during that period* by that person in the production of gross income from that source …
>
> (Emphasis added.)

CONCLUSION

[26] The Special Commissioners and the High Court judge were correct in arriving at their respective conclusions, albeit on different grounds.

[27] The answer to the sole issue for determination is therefore in the negative. The taxpayer's appeal, being without merits, is dismissed with costs. Deposit to the Revenue (respondent) on account of taxed costs.

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[28] My learned brothers, Mohd Ghazali and Vincent Ng JJCA have read this judgment in draft and have expressed their agreement with it to become the judgment of the court.

[29] His Lordship Vincent Ng JCA has also complemented as follows:

(1) I would however wish to make a further addition. In my view the landmark House of Lords case of *Edwards (Inspector of Taxes) and Bairstow & Anor* [1956] AC 14 at p 29 (HL) has established the following principles which are now pretty well settled:

(a) a distinction must be made between pure findings of primary facts and inferences drawn from such findings of primary facts;

(b) if the findings of primary facts are equivocal or insufficient to enable the High Court to decide the question of law sought to be raised in the case stated it is incumbent on the court to remit to the Commissioners for further findings;

(c) the court is precluded from setting aside or overruling a pure finding of fact which is neither equivocal nor insufficient;

(d) (however, the court may set aside or overrule a pure finding of fact if such finding is clearly perverse or ill-founded.

(2) The crucial point here is that the Special Commissioners had found no evidence at all of the existence of the payment of the land-alienation costs. This, in my view, is a pure, and indeed, clear and unequivocal finding of fact which is neither a perverse nor ill-founded finding. As such, being the triers of facts, the Special Commissioners' finding is unassailable by the High Court. In the event, the tax payer's appeal must be dismissed with costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum